COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2018-SC-000194

COMMONWEALTH OF KENTUCKY, DEPARTMENT OF REVENUE and **DANIEL P. BORK,** in his official capacity as Commissioner of the Department of Revenue,

APPELLANTS,

On Transfer from the Kentucky Court of Appeals
Case No. 2018-CA-000585

v.

SARAH R. MOORE,

APPELLEE.

REPLY BRIEF OF APPELLANTS COMMONWEALTH OF KENTUCKY, DEPARTMENT OF REVENUE, AND COMMISSIONER BORK

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief was served via First Class Mail upon the following on March 11, 2019: E. Douglas Richards, 836 Euclid Ave., Suite 321, Lexington, KY 40502; William L. Davis, 108 Pasadena Dr., Suite 200, Lexington, KY 40503; Kevin Henry, Bryan Beauman, and Joshua Salsburey, 333 W. Vine St., Suite 1500, Lexington, KY 40507; William E. Thro, Univ. of Kentucky, 301 Main Building, Lexington, KY 40506; Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Vincent Riggs, Fayette Circuit Clerk, 120 N. Limestone St., Suite C-103, First Floor, Lexington, KY 40507; Kevin C. Burke, Jamie K. Neal, 2200 Dundee Rd., Suite C, Louisville, KY 40205; Evan Smith, 120 N. Front Ave., Prestonsburg, KY 41653; Hon. Lucy Ferguson VanMeter, 120 N. Limestone St., Lexington, KY 40507; Ben Carter, 222 S. 1st St., Suite 305, Louisville, KY 40202; Brent Baughman, Melissa Norman Bork, Kyle W. Miller, 3500 PNC Tower, 101 S. 5th St., Louisville, KY 40202; Neva-Marie Polley Scott, 416 W. Muhammad Ali Blvd. #300, Louisville, KY 40202; Amanda Young, 1700 Destiny Ln., Bowling Green, KY 42104; Karen Hoskins-Gin, Joshua Crabtree, 104 E. 7th St., Covington, KY 41011; Leigha C. Crout, 300 E. Main St., Suite 110, Lexington, KY 40507. I further certify that the record was not checked out of the Clerk's office in preparing this Reply Brief.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT[1]

I. The Appellee's Brief improperly attempts to expand the scope of this appeal.

The Appellee's Brief attempts to divert attention away from the questions that are actually before this Court and instead focus on a host of irrelevant issues, including an attempt to engender sympathy for the Appellee. It is critical that the Court see past these diversionary tactics and understand the question before it, which is a narrow one. The Court is *not* being asked to determine whether UK and the Department of Revenue correctly followed the statutory debt-collection procedures that underlie this dispute. The Court is also *not* being asked to determine which of those statutory procedures would have been the correct one to apply to the Appellee's debts. *Nor* is the Court being asked to determine whether any of those procedures are fair or satisfy the demands of due process. Instead, the *only* questions before the Court are: (1) the very narrow question of whether UK is eligible to have its debts collected by the Department of Revenue by virtue of being part of the executive branch of state government; and (2) the threshold issues of sovereign immunity and exhaustion of administrative remedies. That is it. Those are the only matters before the Court. All other issues raised in the Appellee's Brief are irrelevant to this case and can only be litigated, if at all, in a subsequent case *where they are actually raised. See Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846, 853 (Ky. 2016) (quoting *Ten Broeck Dupont, Inc. v. Brooks*, 283 SW.3d 705, 734 (Ky. 2009)).

The sole relief sought by the Appellee in her Amended Complaint was a "judgment declaring that UK Healthcare and the University may not legally refer debts to the Enterprise Collections Office [of the Department of Revenue], [and] that the Department of Revenue and/or the Enterprise Collections Office may not legally undertake efforts to collect the debt

[1] The Department incorporates by reference all arguments made in the Appellant's Reply Brief in *University of Kentucky, et al. v. Sarah R. Moore*, No. 2018-SC-000193.

allegedly owed by the Plaintiff or similarly situated persons . . . ." [ROA Vol. 1 at 37]. And the Appellee later moved for judgment *solely* on that narrow question, stating:

> The Plaintiff, Sarah R. Moore, through counsel, moves this Court pursuant to the Kentucky Declaratory Judgment Act, KRS 418.040 *et seq.*, seeking a judgment that the Defendant, University of Kentucky, is not an agency, organizational unit or administrative body in the executive branch of state government; that the University may not be [*sic*] lawfully refer the accounts of UK Healthcare to the defendant, Commonwealth of Kentucky, Department of Revenue, for collection under KRS 45.237 *et seq.*; and that the Department of Revenue may not lawfully collect such accounts.

[ROA Vol. 2 at 250].

At the hearing on that Motion, the circuit court acknowledged the narrow grounds on which the Appellee was seeking relief, stating that "the Court does not believe UK is part of the executive branch of the state government. . . . *That's all I've been asked to decide today. That's as far as I'm gonna go.*" [ROA Vol. 3 at 455, VR 3:42:26-3:42:33 (emphasis added)]. And then the circuit court entered a correspondingly narrow Order and Judgment, which simply granted the Appellee's Motion for Declaratory Judgment and declared that "Judgment shall be entered pursuant to the Kentucky Declaratory Judgment Act that the defendant, University of Kentucky, is not 'in the executive branch of state government' for purposes of KRS 45.237 *et seq.* and KRS 12.010." [*Id.* at 434]. That exceedingly narrow ruling—and nothing else—is the subject of this appeal. And it should be reversed.

II. UK is part of the executive branch of state government.

It is a well-established fact that UK is part of the executive branch of state government. The Department's opening Brief thoroughly explains why this is so, and the Appellee's Brief makes virtually no attempt to refute that explanation. In particular, the Appellee's Brief makes scarcely little attempt to rehabilitate the circuit court's erroneous interpretation of *Beshear v. Bevin*, 498 S.W.3d 355 (Ky. 2016), or its erroneous reliance on the Franklin Circuit Court's vacated order in *Beshear v. Bevin*, 16-CI-738. Instead, perhaps in an attempt to distract this

Court's attention from the obvious flaws in the circuit court's reasoning, the Appellee's Brief attempts to take the Court down multiple rabbit holes that have nothing to do with the question at hand.

First, the Appellee suggests that the term "executive branch" does not have constitutional implications. Instead, she argues that it is merely a statutory term. This argument refutes itself. Any notion that the term "executive branch" is a statutory, rather than constitutional, concept is so manifestly misguided that it is barely worth mentioning. This Court has acknowledged time and time again that the Kentucky Constitution establishes three—and *only* three—branches of government: the legislative, judicial, and *executive*. *See, e.g., LRC v. Brown*, 664 S.W.2d 907, 916-17 (Ky. 1984). Any use of the term "executive branch" in a statute is clearly intended to be consistent with the Constitution's establishment of that branch. A statute obviously cannot change the constitutional contours of the executive branch.

Nevertheless, the Appellee appears to argue just that. She first points to the Executive Branch Ethics Code and contends that its provisions demonstrate that the state universities are not part of the executive branch of state government. The Executive Branch Ethics Code, however, has no relevance here. It simply identifies the executive branch officials to whom it applies and then sets forth rules that those officials are required to follow. *See* KRS 11A.005 *et seq.* Nothing in the Ethics Code purports to define which state agencies are within the executive branch and which are not.

Next, the Appellee asserts that the state universities cannot be part of the executive branch because KRS 18A.115(1)(m) excludes them from the "classified service" personnel laws contained in KRS Chapter 18A. This, too, is a red herring. Many quintessentially executive branch agencies are excluded from the requirements of KRS Chapter 18A. For

example, the Office of the Governor is excluded, *see* KRS 18A.115(1)(d), but no reasonable person would argue that it is outside the executive branch.

From there, the Appellee careens to the position that any agency that lacks a close "nexus" to the Governor, or is independent of the Governor's control, cannot be within the executive branch. This argument, which appears to be largely—if not entirely—based on this Court's decision in *Beshear v. Bevin*, 498 S.W.3d 355 (Ky. 2016), is manifestly wrong. There are many agencies within the executive branch that are independent of the Governor's control. Gubernatorial control obviously is not the touchstone of whether an agency is in the executive branch. If it were, then the other constitutional officers in the executive branch—*i.e.*, the Agriculture Commission, Attorney General, Auditor, Secretary of State, and Treasurer—would not be in the executive branch. But they obviously are.

Moreover, *Beshear v. Bevin* actually supports the conclusion that UK is in the executive branch. In fact, it *expressly* acknowledges that the state universities are "state agencies." *Beshear*, 498 S.W.3d at 380. The Appellee is correct that this Court found that the universities "are not part of the executive branch *in the same sense* as the program cabinets and boards directly under the Governor's control," *id.* (emphasis added), but that finding actually proves the Department's argument here. The key point is that this Court did not find that the state universities are not part of the executive branch at all. Rather, it found that they are not part of the executive branch *in the same sense* as those parts that are subject to the Governor's direct control. In other words, the quoted language necessarily implies that the state universities are part of the executive branch *in some other sense*—*i.e.*, in the sense that they are parts of the executive branch over which the Governor's only form of control is his authority to appoint members of their boards.

The Appellee also points out that there are multitudes of public entities in the Commonwealth, ranging from library districts to local human rights commissions, and she argues that it would be impossible to categorize each one as being in one of the three branches of government. To do so, the Appellee says, would be to create a "judge-made swamp." [Appellee Br. at 38]. This concern is unfounded. By and large, the public entities that the Appellee is talking about—like the Allen County Library District—are fundamentally different from UK. Entities like the Allen County Library District are distinctly local in character, and, while they might exercise authority given to them by the state government, they are not *part of state government.* This is significant because it is only the *state* government, as opposed to local governmental entities, that the Kentucky Constitution requires to be divided into three branches. *See* Ky. Const. §§ 27, 28. Thus, because the entities referred to by the Appellee are largely not part of *state* government, it is not necessary to categorize most of those entities as being within one of the three branches of state government.[2]

UK, however, is plainly a part of state government. This is so because UK performs "a function integral to state government," *Withers v. Univ. of Ky.*, 939 S.W.2d 340, 344 (Ky. 1997) (quoting *Ky. Ctr. for the Arts v. Berns*, 801 S.W.2d 327, 332 (Ky. 1991)), and UK "operates under the direction and control of central state government and . . . is funded from the State Treasury." *Id.* at 343. The same cannot be said for most of the governmental entities referred

[2] To be sure, the Constitution identifies several types of local officials as being within the executive branch. *See* Ky. Const. §§ 97-108. Such officials, however, are not exercising distinctly local authority. Instead, they are exercising the Commonwealth's sovereign executive power for the benefit of the entire Commonwealth, albeit in a particular local jurisdiction. For example, Commonwealth's Attorneys prosecute crimes on behalf of the *Commonwealth*, but within specified circuits. The fact that the Constitution recognizes some local officials as being within the executive branch of state government does not mean that every local governmental entity must be classified in one of the three branches of state government. To that end, the legislature provided local governments the enumerated statutory authority to refer debts to the Department. *See* KRS 45.237(5); KRS 45.238(3)(d); KRS 45.241(6)(b).

to by the Appellees. Nowhere is this seen more clearly than in the fact that UK—like the other state universities—receives direct appropriations from the State Treasury. *See* 2018 Ky. Acts Ch. 169, Part I(K)(8).[3] With few exceptions—like the Registry of Election Finance, which is obviously part of state government—the other governmental entities mentioned by the Appellee do not receive direct appropriations from State Treasury because, unlike UK, they are not arms of the central state government. Likewise, those types of entities—with few exceptions—do not perform functions integral to state government and do not operate under the direction and control of central state government. *See, e.g., Coppage Constr. Co. v. Sanitation Dist. No. 1*, 459 S.W.3d 855, 864 (Ky. 2015) (holding that sanitation districts do not perform an integral state function).

Because UK is plainly part of state government, it *must* fall within one of the three branches of state government. The Constitution expressly requires this. *See* Ky. Const. § 27; *see also Brown*, 664 S.W.2d at 917 (holding that there is "no fourth branch of government"). And since UK obviously is not in the legislative or judicial branches, it necessarily *must* fall within the executive branch.

III. Even if UK is not part of the executive branch, it can still refer debts to the Department of Revenue under KRS 131.130(11).

To the extent that the circuit court's judgment can be construed as holding that the Department can never collect debts for UK, it must be reversed even if the Court concludes that UK is not part of the executive branch and therefore cannot rely on the debt collection procedures available in KRS 45.237 *et seq.* The reason for this is simple: KRS 131.130(11) allows the Department to enter into contracts to collect debt for a broader set of public

[3] It is telling that money is appropriated to UK through the biennial *Executive Branch Budget Act*, which, as its name suggests, appropriates money to agencies within the executive branch of state government. *See* 2018 Ky. Acts Ch. 169, Part I(K)(8). Surely the General Assembly has not been laboring all along under the mistaken impression that UK is part of the executive branch of state government.

agencies than just the executive branch of state government. Whereas the debt-collection procedures available in KRS 45.237 *et seq.* are available to *executive branch* agencies, KRS 131.130(11) allows the Department to contract with any state "institution" or "other state organization" for the collection of debts.

The Appellee's Brief does not contest that UK is capable of entering into such a contract with the Department. Instead, it argues that UK has not actually entered into a contract with the Department under this statute, and that, in any event, UK and the Department did not follow the correct procedures to collect a debt under KRS 131.130(11). Moreover, the Appellee's Brief makes backdoor challenges to the constitutionality of KRS 131.130(11). None of these issues, however, were raised in the Appellee's Amended Complaint, and therefore cannot be litigated in this appeal. This case is about whether the Department can collect debts for UK, and KRS 131.130(11) plainly permits the Department to do so. The Appellee's Brief does not even attempt to refute this.

IV. Sovereign immunity bars the Appellee's claim.

The Appellee intends to use the circuit court's declaratory judgment as *res judicata* in a separate suit for monetary damages against the Department and UK. Sovereign immunity bars this. In fact, her brief all but admits this.

A declaratory judgment cannot be obtained under these circumstances. It is a well-established principle that a litigant cannot evade sovereign immunity in this manner. *See Green v. Mansour*, 474 U.S. 64, 73 (1985). The Appellee attempts to distinguish *Green* on its facts, but that attempt is meaningless. *Green* is authoritative not because it is factually identical to this case, but because it acknowledges the foregoing rule, which applies here.

If the Court does not want to rely on *Green*, it can rely on a host of other cases that recognize the same principle. For example, in *Texas Natural Resource Conservation Commission v.*

IT-Davy, 74 S.W.3d 849, 856 (Tex. 2002), the Texas Supreme Court likewise held that "private parties cannot circumvent the State's sovereign immunity from suit by characterizing a suit for money damages, such as a contract dispute, as a declaratory-judgment claim." (citing *W.D. Haden Co. v. Dodgen*, 308 S.W.2d 838, 842 (Tex. 1958)). The rule is simple: a declaratory judgment action that will be used to establish liability for monetary relief against the state is barred by sovereign immunity. And that rule applies with full force here.

The Appellee tries to get around this by arguing that she will not use a favorable judgment in this case to obtain an award of damages against the Commonwealth, but will instead simply use the judgment to "ask that her own money be paid back to her." [Appellee's Br. at 42]. This is a creative argument, but one that this Court has essentially rejected already. In *Beshear v. Haydon Bridge, Inc.*, 416 S.W.3d 280 (Ky. 2013) (known as *Haydon Bridge II*), the plaintiffs sought "retroactive injunctive relief" in the form of restitution of private funds—*i.e.*, the return of the plaintiffs' funds. This Court rejected that claim for relief in *Haydon Bridge II*, finding that no matter how the claim was characterized, it would "impinge on sovereign immunity because [it would] require monetary relief that can only be satisfied by draws on [the] state's treasury." *Id.* at 294. The same is ultimately true here, and so the Appellee's claim is likewise barred by sovereign immunity.

V. The Appellee failed to exhaust her administrative remedies.

At its core, this case is about the Appellee's displeasure with the manner in which the Department has collected some of the debt that the Appellee owes to UK. Notably, the Appellee does not contest that she has accepted UK's healthcare services without paying for them. Instead, it appears that her main complaint is with the manner in which UK and the Department have collected her debt. Specifically, it appears that her primary argument is that the Department can only collected "liquidated" debts, and a debt cannot be liquidated unless

the creditor has filed a lawsuit and obtained a judgment. [*See, e.g.,* Appellee's Br. at 6]. The Appellee is incorrect in arguing that the Department can only collect liquidated debts, but even if she were correct, that would not help her here. What she fails to realize is that her debt to UK is liquidated. It is not necessary for UK or the Department to sue her and obtain a judgment in order for her debt to be liquidated.

Generally speaking, a lawsuit and judgment are not necessary in order for a debt to be viewed as liquidated. *See Lipson v. Univ. of Louisville*, 556 S.W.3d 18, 30 (Ky. App. 2018). Nevertheless, the Appellee argues that the definition of "liquidated debt" in KRS 45.241 requires UK to sue her and obtain a judgment before the Department can undertake collection effort on UK's behalf. She points to KRS 45.241(1)(b)(1), which defines "liquidated debt" as "a legal debt for a sum certain which has been certified by an agency as final due and owing, all appeals and legal actions having been exhausted." The Appellee construes the phrase about the exhaustion of appeals and legal actions as a requirement that UK obtain a judgment against her in court. But that is not what it means.

When the statute speaks about exhausting appeals and legal actions, it is talking about the *Appellee's* exhaustion of appeals and legal actions, not UK's. This is made clear by KRS 45.241(5) and (6). KRS 45.241(5) requires the Department to promulgate regulations establishing the procedures—including administrative appeals procedures—by which agencies can collection their own "debts," as opposed to "liquidated debts." KRS 45.241(6) then permits those uncollected debts that have been "liquidated" to be referred to the Department for collection. How does a debt become "liquidated" under KRS 45.241 and therefore capable of being referred to the Department for collection? The answer is simple: it becomes liquidated for purposes of KRS 45.241 when the debtor exhausts—or fails to exhaust—the available administrative and judicial appeal rights. This provision requiring an administrative

appeals process would be pointless if liquidating a debt required filing a lawsuit and obtaining a judgment. In other words, it has always been possible for UK to sue its debtors. If it is still required to do so even after the completion of the administrative process required by KRS 45.241(5), then that administrative process serves no purpose. But that cannot be true because no part of a statute can be interpreted so as to make it pointless. *See, e.g., Travelers Indem. Co. v. Armstrong*, 565 S.W.3d 550, 563 (Ky. 2018) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)). Thus, KRS 45.241(5) must have meaning, and that meaning is this: it allows agencies like UK to collect their debts through administrative proceedings rather than legal actions, and when those administrative proceedings are exhausted and still prove unsuccessful in collecting a debt, the debt becomes "liquidated" for the purposes of KRS 45.241(6) and can be referred to the Department for collection. To put it yet another way, the entire debt-collection process established by KRS 45.241 is intended to be an alternative to the traditional process of suing debtors. Therefore, KRS 45.241 certainly does not *require* suing debtors.

The Appellee never availed herself of any administrative appeal rights. When the time for doing so expired, her debt became liquidated under 45.241 and was appropriately referred to the Department for collection. She cannot now be heard to complain about this process when she failed to contemporaneously raise any objections.

CONCLUSION

The Fayette Circuit Court's judgment should be reversed

Respectfully submitted,

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